

IDENTIFICATION OF INDIAN CHILDREN AND PROPER NOTIFICATION IN CASES SUBJECT TO THE INDIAN CHILD WELFARE ACT

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Division of Children and Family Services
Department of Health and Family Services

BACKGROUND

In 1978, the U.S. Congress passed the Indian Child Welfare Act (ICWA). ICWA states as its purpose: "The Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture,..." [25 USC1902].

The Congressional findings published with the enactment of ICWA include the following:

- "...that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
- ...that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
- ...that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." [25 USC 1901]

Wisconsin statutes recognize the federal law. Section 48.028, Wis. Stats., states: "The Indian child welfare act, 25 USC 1911 to 1963, supersedes the provisions of this chapter in any child custody proceeding governed by that act."

ICWA regulates the removal of Indian children from their homes or from Indian custodians for certain child welfare reasons other than delinquency and other than divorce, and provides protections not only for the Indian child and parent or custodian, but also for the tribe. We have provided you with information on the Indian Child Welfare Act in the past (see Information Memo DCS-94-35 and Numbered Memo DCS-95-45). Information for the designated Tribal Agents for Service of Notice for the federally recognized Wisconsin tribes is attached to this numbered memo. Information for contacting the designated tribal agents for federally recognized tribes throughout the United States may be obtained by reviewing the Federal Register, Volume 68, Number 235, December 8, 2003, at: <http://frwebgate6.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=797948271203+7+0+0&WAIAction=retrieve> This is the most recent list, however the Bureau of Indian Affairs updates the list annually. Other contact information for federally recognized tribes throughout the United State may be accessed through the website of the National Indian Child Welfare Association (NICWA) at: <http://www.indians.org/Resource/FedTribes99/fedtribes99.html>. The full Indian Child Welfare Act may be found at the following website: www.nicwa.org/policy/law/icwa/ICWA.pdf.

REQUIRED DOCUMENTATION OF ICWA ACTIVITIES RELATED TO NOTIFICATION

The Indian Child Welfare Act applies to:

- any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand;
- any action, voluntary or involuntary, resulting in the termination of the parent-child relationship,
- the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
- the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

- “Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents”. [25 USC 1903(1)] [Note: If a delinquent act results in a termination of parental rights (TPR), the TPR action is subject to ICWA, as noted above.]

ICWA contains a number of requirements that govern child welfare agencies and the court system when handling child welfare cases involving Indian children. This memo does not address all of the ICWA requirements. **The purpose of this memo is to describe the required use of forms developed for and included in eWiSACWIS to address just the following ICWA requirement:**

“...the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention...” [25 USC 1912(a)].

Note: ICWA defines the term “foster care placement” as “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.” [25 USC 1903(1)(i)]

Since the placing agency has a responsibility to notify an Indian child’s parent, Indian custodian, and tribe, the placing agency also has a responsibility to determine whether any child it seeks to place is an Indian child or might be an Indian child as defined by ICWA.

The Indian Child Welfare Act defines an “Indian child” as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. . .” [25 USC 1903(4)]. **The determination as to whether a child is a member of a tribe or eligible for membership in the tribe is made by the tribe.** ICWA defines an “Indian tribe” as “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Department of the Interior] because of their status as Indians, including any Alaska Native village...” **Therefore, the requirements of ICWA apply to county departments, the Bureau of Milwaukee Child Welfare, the DHFS adoption program, private child placing and adoption agencies, and any agency or individual seeking the placement of an Indian child affiliated with any federally recognized tribe, not just tribes located in Wisconsin.**

In order to provide notification of placement proceedings pursuant to the Indian Child Welfare Act for every Indian child, the placing agency must:

- Know whether each child subject to such a proceeding may be an Indian child.
- If the child may be an Indian child, send information to the tribe or tribes or to the Bureau of Indian Affairs so that a tribe may confirm whether the child is a member or eligible for membership.
- Send notice to the parent or Indian custodian and the tribe of initial and certain other proceedings and a description of their rights under ICWA.

The above responsibilities have been incorporated into forms that have been added to eWiSACWIS as templates. The forms must be used as described in this memo in order to assure timely identification of Indian children who are subject to an involuntary child custody proceeding governed by ICWA. Failure to identify Indian children can nullify court proceedings that have not been conducted in accordance with the Indian Child Welfare Act.

The forms are:

- Screening for Child’s Status as Indian
- Child’s Biological Family History
- Request for Confirmation of Child’s Indian Status

- Notice of Involuntary Child Custody Proceeding Involving an Indian Child (includes the Notification of Rights Under the Indian Child Welfare Act)

The above forms replace the following letter templates in WiSACWIS: *ICWA Notification Letter* and *Notification of Indian Child Placed Out of Home*.

The first three forms are **not** needed in cases where the agency already knows that the child is an Indian child, knows the child's tribal affiliation, and knows that the tribe(s) has already determined that the child is a member of the tribe or eligible for membership.

The fourth form is required in all cases where the agency is requesting that a petition be filed under s. 48.13, Stats., or s. 938.13 (4), (6), (6m), or (7), Stats., that may result in the removal of an Indian child from his or her home or from his or her Indian custodian or where the agency is requesting that a petition be filed for TPR, as specified in ICWA.

Specific information about each of the forms and when they are to be used is provided below.

Screening for Child's Status as Indian

The purpose of this form is to guide the caseworker in gathering the information pertinent to determining whether a child being assessed by the child welfare system might be an Indian child subject to the Indian Child Welfare Act or an Indian child who might benefit from services provided by or coordinated with the tribe. The form information can also be helpful to a tribe in determining whether the child is a tribal member or is eligible for membership. Finally, the form also serves to document that the required information has been gathered by the agency.

The *Screening for Child's Status as Indian* must be completed for each child in every case:

- where an initial assessment is completed in response to a report of alleged maltreatment or threatened maltreatment by a person described in s. 48.981(1)(am) 1. through 4., Stats., (referred to as a primary caregiver in the CPS Investigation Standards), or
- where a child is taken into custody under s. 48.19, Stats., or s. 938.19, Stats., for reasons unrelated to delinquency, or
- for whom a request to file a petition is submitted in a child custody proceeding subject to ICWA.

The *Screening* does not need to be completed in the following circumstances:

- the agency already knows the child to be an Indian child and knows with which tribe or tribes the child is affiliated
- a *Screening for Child's Status as Indian* is already part of the case record
- the child's parents are immigrants

The *Screening for Child's Status as Indian* must be completed within the following timeframe, whichever comes first:

- as part of completion of the CPS initial assessment;
- at the time the child is taken into custody, if a parent or other relative is available and can be located to be interviewed;
- at the time a referral is made for the filing of a petition; or
- within 24 hours after the above actions, if a parent was unavailable prior to the actions.

If the parents continue to be unavailable and no other relatives are available, document in the case record why the *Screening* could not be completed within the required timeframe and complete the *Screening* at the first opportunity that a family member becomes available.

The *Screening for Child's Status as Indian* form must be completed in all instances described above and maintained in the case record. The agency must make active efforts to gather the

information. If the *Screening for Child's Status as Indian* form is not completed, the reason for not doing so and a description of the efforts made by the agency to obtain the information must be documented in the case record.

Child's Biological Family History

The purpose of the *Child's Biological Family History* is to gather sufficient information to enable a particular tribe or tribes to identify the child and child's family and determine whether the child is a member of or eligible for membership in the tribe or to enable the Bureau of Indian Affairs to identify the appropriate tribe or tribes.

The *Child's Biological Family History* form must be completed if the *Screening for Child's Status as Indian* indicates that the child might be an Indian child *and* one of the following circumstances is present:

- The child is taken into custody under s.48.19, Stats., or s. 938.19, Stats., for reasons unrelated to delinquency, or
- The agency is seeking a petition under s. 48.13, Stats., or s. 938.13(4), (6), (6m), (7), Stats., and removal of the child is a possible disposition of the proceedings, or
- The child has been placed in out of home care on a voluntary placement agreement under s.48.63(1), Stats., or
- The agency is recommending out of home placement or knows that any other party is going to recommend out of home placement

Note: Beginning in January of 2007, the Child's Biological Family History will be required on any case opened for ongoing services that is subject to the Ongoing Child Protective Services Standards.

The child's parent or another relative or relatives should be interviewed for the information. As much information as possible should be gathered and documented in order to enable a tribe or the Bureau of Indian Affairs to accurately identify the child, the child's family, and the appropriate tribe or tribes. Failure to provide sufficient information to identify the child and child's family may result in a decision that the notice of hearing provided was not legally sufficient.

The *Child's Biological Family History* form should be completed with the family at the same time that the *Screening for Child's Status as Indian* form is completed, unless family members with the needed information are not available at that time. If it cannot be completed at the time of completion of the *Screening for Child's Status as Indian* form, it must be completed as soon as possible thereafter.

The completed *Child's Biological Family History* must be maintained in the case record. The agency must make active efforts to gather the information. If the *Child's Biological Family History* is not completed, the reason for not doing so and a description of the efforts made by the agency to obtain the information must be documented in the case record.

Request for Confirmation of Child's Indian Status

The purposes of the *Request for Confirmation of Child's Indian Status* form are both to alert a tribe that a specific child is in the child welfare system and to obtain verification as to whether the child is a member of a tribe or eligible for membership. This information is necessary for the court to determine whether the child is subject to ICWA.

The *Request for Confirmation of Child's Indian Status* form must be sent to the tribe or tribes, if known, or to the Bureau of Indian Affairs, if the specific tribe is not known, along with the *Screening for Child's Status as Indian* and *Child's Biological Family History* forms in the following circumstances:

- the agency is seeking a petition under s. 48.13, Stats., or s. 938.13 (4), (6), (6m), or (7), Stats., and removal of the child is a possible disposition of the proceedings, or
- if the *Request* has not already been sent and the agency is seeking a TPR petition under s. 48.415, Stats.; or
- the agency has taken the child into custody on an emergency basis under s. 48.19, Stats., and not released the child under s. 48.20, Stats.
- the agency has taken the child into custody on an emergency basis under s. 938.19, Stats., for reasons unrelated to delinquency, and not released the child under s. 938.20, Stats.

If a petition has already been filed at the time the *Request for Confirmation of Child's Indian Status* form is mailed, the *Notice of Involuntary Child Custody Proceeding Involving an Indian Child* form must also be completed and sent.

Early notification should be made whenever possible as it gives greater opportunity for early tribal involvement and delivery of appropriate and culturally relevant services. County agencies that border a reservation or contain service areas for the Ho Chunk Nation should include in any 161 Agreements the mutually agreed upon circumstances, beyond the required circumstances listed above, in which the tribe will be sent the *Screening for Child's Status as Indian*, *Child's Biological Family History*, and *Request for Confirmation of Child's Indian Status* forms.

A completed *Request for Confirmation of Child's Indian Status* form and any response from the tribe/tribes or the Bureau of Indian Affairs must be maintained in the case record.

Notice of Involuntary Child Custody Proceeding Involving an Indian Child

The purpose of the *Notice of Involuntary Child Custody Proceeding Involving an Indian Child* form is to fulfill the requirement in ICWA that "...the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention..." [25 USC 1912(a)].

The county agency and Bureau of Milwaukee Child Welfare must send the *Notice of Involuntary Child Custody Proceeding Involving an Indian Child* form to the tribe or tribes, if known, or to the Bureau of Indian Affairs, if the specific tribe is not known, along with the *Screening for Child's Status as Indian*, *Child's Biological Family History*, and *Request for Confirmation of Child's Indian Status* forms in the following circumstances:

- a child is taken into temporary physical custody on an emergency basis under s. 48.19, Stats., and not released under s. 48.20, Stats.
- a child is taken into temporary physical custody on an emergency basis under s. 938.19, Stats., for reasons unrelated to delinquency, and not released under s. 938.20, Stats.
- the agency has filed a petition under s. 48.13, Stats., or s. 938.13 (4), (6), (6m), or (7), Stats., and removal of the child is a possible disposition of the proceedings, or
- the agency has filed a TPR petition under s. 48.415, Stats.

If the agency has already sent the *Screening*, *Family History*, and *Request for Confirmation* forms to the tribe(s), then only the *Notice of Involuntary Child Custody Proceeding Involving an Indian Child* form must be sent when the date and time of the court proceeding is known.

The county agency and BMCW must mail the *Notice of Involuntary Child Custody Proceeding Involving an Indian Child* form to the appropriate tribe or tribes, or, if the specific tribe is unknown, to the Bureau of Indian Affairs, and to the parent(s) or Indian custodian, as defined in ICWA. As noted above, the form must be sent by registered mail with return receipt requested. The BIA Guidelines also allow for notice to be provided by personal service. The *Notice of Involuntary Child Custody Proceeding Involving an Indian Child* form also contains an attachment describing the parent's, Indian custodian's, and tribe's rights under ICWA (*Notification of Rights*

Under the Indian Child Welfare Act). This notification must be sent with the ***Notice of Involuntary Child Custody Proceeding Involving an Indian Child*** form, as required by ICWA.

The *Notice of Involuntary Child Custody Proceeding Involving an Indian Child* form must be sent to every tribe to which the child or child's relative claims some affiliation, unless the agency has received notification from these tribes that the child is neither a member of nor eligible for membership in the tribe in response to the *Request for Confirmation of Child's Indian Status*.

The Indian Child Welfare Act states that "No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the [Bureau of Indian Affairs]: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to 20 additional days to prepare for such proceeding." [25 USC 1912.(a)]. **The *Notice of Involuntary Child Custody Proceeding Involving an Indian Child* and the attached *Notification of Rights Under the Indian Child Welfare Act* forms must be sent in accordance with the above requirements, except as provided below for emergency removals.**

Emergency Removal of an Indian Child

The only exception to the above-noted 10-day notice with an additional 20 days to prepare is a removal made on an emergency basis. The Indian Child Welfare Act states that "Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child...in order to prevent imminent physical damage or harm to the child. The State authority, official or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate." [25 USC 1922]

Therefore, if the Indian child is removed on an emergency basis, the tribe(s) or the Bureau of Indian Affairs must be notified of the hearing under ss. 48.21 or 938.21, Stats., with all of the accompanying forms necessary to identify if the child is a member or eligible for membership, with the same diligence and timeliness with which the parents are notified. Documentation of the notification must be maintained in the case record.

Guidelines for Subsequent Court Proceedings

The placing agency must notify the tribe or tribes at the initiation of the court proceedings as described above. If the tribe becomes a party to the case, it will receive service by the court of all subsequent hearings, motions, and pleadings under that action. The placing agency would not need to notify the tribe of subsequent court proceedings in these circumstances provided the tribe receives notice as a party, except that the tribe should be always be notified of the filing of an TPR petition as described above.

The tribe has a right to intervene at any point in the proceedings. **If a tribe declines to become involved when first notified of a court action to remove an Indian child from a parent, the tribe may still choose to intervene at a later date and is granted that right under ICWA. In such cases, the placing agency must continue to notify the tribe or tribes of each subsequent court proceeding to enable the tribe to become party to the proceedings at a later date, if it so chooses.**

If the agency knows a child's tribal affiliation when the agency requests a petition, this information must be provided to the court as part of the process of initiating the petition. It is insufficient to leave the responsibility of notification of the initiation of court proceedings to the court, however, as ICWA requires that notice be provided by the agency seeking to place a child.

Other Proceedings

As indicated above, the following juvenile in need of protection or services (JIPS) court proceedings are not covered under ICWA:

- s. 938.13(12), a child under 10 years of age has committed a delinquent act, and
- s. 938.13(14), a child has been determined to be not responsible for a delinquent act by reason of mental disease or defect.

Therefore the notice, jurisdiction and placement requirements of ICWA do not have to be met. However, the Department strongly encourages agencies to notify tribes when an Indian child is provided protection or services under the above categories, and to involve the tribe in providing culturally relevant and appropriate services. If the child is placed outside his or her home, the Department encourages agencies to follow ICWA placement priorities for these tribal children.

Designated Wisconsin Tribal Agents for ICWA Service of Notice

Bad River Band of Lake Superior Chippewa Indians of Wisconsin, ICWA Coordinator, P.O. Box 55, Odanah, WI 54861. Telephone: (715) 682-7135.

Forest County Potawatomi Community of Wisconsin, ICWA Coordinator, P.O. Box 340, Crandon, WI 54520. Telephone: (715) 478-7329.

Ho-Chunk Nation, ICWA Coordinator, P.O. Box 40, 720 Red Iron Road, Black River Falls, WI 54615. Telephone: (715) 284-2622.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, ICWA Coordinator, 13394 W. Trepania Road Building 1, Hayward, WI 54843. Telephone: (715) 634-8934.

Lac du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, ICWA Director, P.O. Box 189, Lac du Flambeau, WI 54538. Telephone: (715) 588-1511.

Menominee Indian Tribe of Wisconsin, ICWA Coordinator, P.O. Box 520, Keshena, WI 54135-0910. Telephone: (715) 799-5161.

Oneida Nation of Wisconsin, ICWA Coordinator, P.O. Box 365, Oneida, WI 54155-0365. Telephone: (920) 490-3724.

Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin, ICWA Director, 88385 Pike Road, Highway 13, Bayfield, WI 54814. Telephone: (715) 779-3747, Ext. 18.

St. Croix Chippewa Indians of Wisconsin, ICWA Coordinator, 24663 Angeline Avenue, Webster WI 54893. Telephone: (715) 349- 2195.

Sokaogon Chippewa (Mole Lake) Community of Wisconsin, ICWA Coordinator, 3051 Sand Lake Road, Crandon, WI 54520. Telephone: (715) 478-2520.

Stockbridge Munsee Community of Wisconsin, ICWA Coordinator, W 12802 County Road A, Bowler, WI 54416. Telephone: (715) 793-45801.

BIA Contacts

Midwest Region Larry Morrin, Regional Director, One Federal Drive, Room 550, Fort Snelling, MN 55111-4007. Telephone: (612) 713-4400; Fax (612) 713-4401.

Rosalie Clark, Regional Social Worker, One Federal Drive, Room 550, Fort Snelling, MN 55111-4007. Telephone: (612) 713-4400, Ext. 1071; Fax (612) 713-4439.